

To: Quast, Sylvia[Quast.Sylvia@epa.gov]
From: Zito, Kelly
Sent: Wed 8/19/2015 10:05:27 PM
Subject: FW: DOJ response to Senator Heinrich's staff re: Guidance on FTCA Claims, Standard Form 95

Attorney Client/Ex. 5

From: Maier, Brent
Sent: Wednesday, August 19, 2015 3:04 PM
To: Manzanilla, Enrique; Allen, HarryL; Tenley, Clancy; Yogi, David; Harris-Bishop, Rusty
Cc: Zito, Kelly; Keener, Bill; Russo, Rebecca; Kao, Jessica
Subject: FW: DOJ response to Senator Heinrich's staff re: Guidance on FTCA Claims, Standard Form 95

Please see attached below.

Brent Maier

Congressional Liaison

U.S. Environmental Protection Agency, Region IX

75 Hawthorne St. (OPA-3)

San Francisco, CA 94105

Ph: 415.947.4256

From: Levine, Carolyn
Sent: Wednesday, August 19, 2015 2:57 PM
To: Quast, Sylvia; Michaud, John; Maier, Brent; Gray, David
Subject: FYI: DOJ response to Senator Heinrich's staff re: Guidance on FTCA Claims, Standard Form 95

FYI, DOJ Leg. Affairs reply to Senator Heinrich's inquiry.

Carolyn Levine

Office of Congressional and Intergovernmental Relations

U.S. EPA

(202) 564-1859

levine.carolyn@epa.gov

From: Rodriguez, Ernesto (Heinrich) [mailto:Ernesto_Rodriguez@heinrich.senate.gov]

Sent: Wednesday, August 19, 2015 2:51 PM

To: Wilson, Karen L (OLA)

Subject: RE: Request for DOJ Guidance on FTCA Claims, Standard Form 95

Karen,

Many thanks for your quick assistance on pulling this together for us. I truly appreciate it.

Best,

Ernesto Rodriguez

Legislative Assistant | Office of U.S. Senator Martin Heinrich of New Mexico

Web: Heinrich.Senate.Gov

Email: Ernesto_Rodriguez@Heinrich.Senate.Gov

Tel: 202.224.5521

Address: 303 Hart Office Building, Washington, D.C. 20510

CONNECT: [@Martin Heinrich](#) | fb.com/MartinHeinrich

From: Wilson, Karen L (OLA) [<mailto:Karen.L.Wilson@usdoj.gov>]
Sent: Wednesday, August 19, 2015 10:00 AM
To: Rodriguez, Ernesto (Heinrich)
Cc: Britton, Joe (Heinrich); Sullivan, Michael (Heinrich)
Subject: RE: Request for DOJ Guidance on FTCA Claims, Standard Form 95

The Department cannot provide legal guidance, however I asked staff to address your questions. This does not constitute legal guidance to you or your constituents. While the SF 95 is straight forward and can be filled out without an attorney, if they desire, they may seek guidance from private counsel. For your convenience, I have provided a link to the Civil Division's website for an explanation of the form and you could also consult the regulations codified at 28 CFR part 14. Hope this is helpful.

<http://www.justice.gov/civil/documents-and-forms-0#tftca>

- By filing a claim under the FTCA using Standard Form 95, will a claimant preclude any other viable claims resulting from the Gold King Mine waste spill under the FTCA?

The Attorney General is authorized by 28 U.S.C. 2672 to issue regulations to govern consideration and adjustment by Federal agencies of claims presented under the FTCA. One of those regulations, 28 CFR 14.2(a), provides: "For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have

occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.” Use of an SF95 to present a tort claim is not required, but its use is encouraged.

- What is the process that a claimant must follow in order to amend a claim made using Standard Form 95?

Another of the Attorney General’s regulations, 28 CFR 14.2(c), governs the amendment of tort claims, and provides: “A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the agency shall have six months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until six months after the filing of an amendment.”

- Under what circumstances, if any, would a claimant preclude later claims of damage stemming from the Gold King Mine waste spill after submitting an initial claim using Standard Form 95?

Unless a claimant first presents a tort claim against the United States to the appropriate Federal agency, the claimant will be foreclosed from later instituting an action on the claim under the FTCA. See 28 U.S.C. 2675. Any tort claim against the United States will be forever barred unless it is presented to the appropriate Federal agency within two years after the claim accrued. See 28 U.S.C. 2401(b). If, for example, a claimant presented a specific claim to the appropriate federal agency within the applicable time limit, but failed to present a different claim within two years after that claim accrued, the claimant would be precluded from bringing an action on the claim that was not timely presented. In addition, a claimant’s acceptance of a settlement under the FTCA is final and conclusive on the claimant and constitutes a complete release by the claimant of any claim against the United States, or against the Federal employee whose negligence gave rise to the claim, by reason of the same subject matter. See 28 U.S.C. 2672. Piecemeal settlements of claims are not permitted.

Karen L Wilson

Attorney Advisor

Office of Legislative Affairs

U.S. Department of Justice

Direct: 202-616-0658

Fax: 202-514-9353

From: Rodriguez, Ernesto (Heinrich) [mailto:Ernesto_Rodriguez@heinrich.senate.gov]

Sent: Monday, August 17, 2015 9:17 AM

To: Wilson, Karen L (OLA)

Cc: Britton, Joe (Heinrich); Sullivan, Michael (Heinrich)

Subject: Request for DOJ Guidance on FTCA Claims, Standard Form 95

Dear Ms. Wilson:

As a result of the U.S. Environmental Protection Agency's (EPA) role in causing the Gold King Mine waste spill in Colorado and Northern New Mexico, some of our constituents in New Mexico are starting the claims process against EPA under the Federal Tort Claims Act (FTCA). However, some constituents are concerned about the procedure for filing claims against EPA using Standard Form 95. Specifically, the Attorney General of the Navajo Nation asked for Senator Heinrich's assistance in securing formal guidance from the Department of Justice regarding questions that some potential claimants in the region are encountering.

Some of our constituents are concerned that by initiating the FTCA claims process with Standard Form 95, a claimant will preclude themselves from either amending the claim at a later date, or from pursuing a claim in another forum. We request formal legal guidance from the Department of Justice on the following questions as soon as possible:

- By filing a claim under the FTCA using Standard Form 95, will a claimant preclude any other viable claims resulting from the Gold King Mine waste spill under the FTCA?
- What is the process that a claimant must follow in order to amend a claim made using Standard Form 95?
- Under what circumstances, if any, would a claimant preclude later claims of damage stemming from the Gold King Mine waste spill after submitting an initial claim using Standard Form 95?

I have cc'd Michael Sullivan, Senator Martin Heinrich's state outreach director, as well as Joe Britton, Senator Heinrich's chief of staff, on this email. If you have any questions, please do not hesitate to contact me directly at 202-228-1609. Thank you for your prompt assistance on this matter.

Ernesto Rodriguez

Legislative Assistant | Office of U.S. Senator Martin Heinrich of New Mexico

Web: Heinrich.Senate.Gov

Email: Ernesto_Rodriguez@Heinrich.Senate.Gov

Tel: 202.224.5521

Address: 303 Hart Office Building, Washington, D.C. 20510

CONNECT: [@MartinHeinrich](https://twitter.com/MartinHeinrich) | fb.com/MartinHeinrich